

# GENDER-RELATED PERSECUTION: A LEGAL ANALYSIS OF GENDER BIAS IN ASYLUM LAW

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## INTRODUCTION

The media coverage of rape camps in Bosnia<sup>1</sup> and the recently discovered Japanese Army documents corroborating Japan's historical use of "comfort women"<sup>2</sup> have focused attention on an otherwise overlooked issue in the public's consciousness: women victims of human rights persecution do not receive equal protection.<sup>3</sup> This inequality exists despite acknowledgement of its unfairness.<sup>4</sup> In order to redress the inequality, some argue for the establishment of war crimes trials<sup>5</sup> to punish and deter these mass rapes,<sup>6</sup> while others insist upon the reformation of asylum laws to protect women refugees who have suffered gender-related persecution.<sup>7</sup> This paper focuses on the latter argument.<sup>8</sup>

1. See, e.g., Tamar Lewin, *The Balkan Rapes: A Legal Test for the Outraged*, N.Y. TIMES, Jan. 15, 1993, at B16 (reporting that an estimated 20,000 Muslim women had been raped since the fighting began in April, 1992); Warren Strobel, *Washington Presses for Persecution of Bosnian War Crimes*, WASH. TIMES, Feb. 12, 1993, at A7.

2. "Comfort women" is the euphemism Japan used to describe women who were conscripted for sexual service. Former comfort women have described the kidnapping, rapes, beatings and torture they experienced if they tried to resist or escape. Japanese Army documents unearthed last year corroborated that women had actually been conscripted as comfort women by government order. Merrill Goozner, *Still Fighting Shame, Japanese Army's Sex Slaves Demand Justice*, CHI. TRIB., Apr. 4, 1993, at C1.

3. For a general account of the atrocities and injustice suffered by women world-wide, see AMNESTY INTERNATIONAL, *WOMEN IN THE FRONT LINE: HUMAN RIGHTS VIOLATIONS AGAINST WOMEN* (1990). See also AMERICA'S WATCH, *THE WOMEN'S RIGHTS PROJECT, UNTOLD TERROR: VIOLENCE AGAINST WOMEN IN PERU'S ARMED CONFLICT* 58 (1992) (concluding that despite international prohibitions against murder, torture, and ill-treatment of non-combatants, both the government security forces and the Shining Path, the Communist party of Peru, use violence against civilian women as a form of tactical warfare, with soldiers and police routinely raping and or murdering women).

4. See The Convention on the Political Rights of Women, 193 UNTS 135, July 7, 1954; The Declaration on the Elimination of All Forms of Discrimination Against Women, 1979, G.A. Res. 2263, cited in HUMAN RIGHTS: SIXTY MAJOR GLOBAL INSTRUMENTS (Winston E. Langley ed., 1992) (emphasizing the necessity and importance of addressing discrimination against women).

5. See Julia Preston, *U.N. Moves to Create Balkan War Crimes Panel: Final Security Council Vote on Nuremberg-Style Tribunal Likely to Come Next Week*, WASH. POST, Feb. 19, 1993, at A24 (noting that establishing this tribunal would satisfy calls to investigate and prosecute war crimes perpetrated during more than a year and a half of Yugoslavian warfare; see also Helen Maserati, *War Crimes Trials*, ATLANTA J. & CONST., Mar. 28, 1993, at A8 (summarizing legal experts' fears that a peace treaty would compromise prosecution of high-level leaders responsible for the systematic rape of thousands of women)).

6. See Amy Hamilton, *Catharine A. MacKinnon to Represent Croatian, Muslim Wartime Rape Survivors*, OFF OUR BACKS, Feb. 1993, at 3.

7. There is an active international campaign to have the U.N. definition of refugee changed to include persecution by sex as a criterion for refugee consideration. More than 200,000 people worldwide have signed a petition urging the United Nations Conference on Human Rights in Vienna in June, 1993 to consider women's rights equally. See Alan Thompson, *Women Refugees Pushed Aside, Advocates Say*, TORONTO STAR, May 15, 1993, at D5 (reporting on a conference covering gender issues and refugees sponsored by the Centre for Refugee Studies at York).

8. The terms gender-related persecution and sex-related persecution in this paper are used

Part I of this paper explores the facade of gender-neutral legal standards that international law, of which refugee/asylum law is a subset, claims as its own. A detailed gender analysis reveals, however, that this alleged legal neutrality is actually based on male standards, excluding normative female experiences. Although estimates of the world's refugee population have concluded that "three-quarters of the world's refugees are women and children,"<sup>9</sup> refugee/asylum law is biased towards males. Protection is often denied to women because the persecution they suffer does not fit into the five enumerated categories that presently define refugee and asylum status: persecution on account of race, religion, nationality, membership in a social group, or political opinion.<sup>10</sup> One human rights activist, Diana Bronson, noted that telling women refugees to return to their persecutors is "the logical equivalent to having told a Jew in the 1930s to return to Germany and accept his or her legal discrimination."<sup>11</sup>

The United States has yet to treat gender bias in refugee/asylum law as a serious issue. The lack of attention to gender issues is due in part to the presumption that the applicable laws are neutral.<sup>12</sup> Not

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interchangeably. Most of the literature fails to make a distinction between the terms gender and sex. Arguably, however, *sex*-related persecution is limited to persecution against women on account of their sex; whereas, *gender*-related persecution also includes persecution of persons on account of their sexual orientation.

This paper does not include research on persecution based on sexual orientation; however, persecuted gays and lesbians also clearly suffer a lack of protection. See David Tuller, *Gay's Request for Asylum Based on Sex Persecution: Brazilian Talks of Dangers of Going Back Home*, S.F. CHRON., May 20, 1993, at A19 (contending that the sexual orientation of Marcelo from Brazil would expose him to deadly danger if he were forced to return to Brazil from the United States).

9. Thompson, *supra* note 7; see B.G. RAMCHARAN, THE CONCEPT AND PRESENT STATUS OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS FORTY YEARS AFTER THE UNIVERSAL DECLARATION 243 (1989) (stating that "the great majority [of refugees are] mainly women and children").

10. See Convention Relating to the Status of Refugees, 1951, art. 1(A)(2), 189 U.N.T.S. 150, (defining a refugee as one who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . ."); see also 8 U.S.C. § 1101(a)(42)(A) (1988).

11. See Mary Williams Walsh, *Battered Women as Refugees: Female Asylum-Seekers in Canada Say They're Being Persecuted in their Homelands on the Basis of their Sex. Should Balkan Rape Victims and Feminists in Islamic States Qualify as Political Refugees?*, L.A. TIMES, Feb. 23, 1993, at A1 (relating the story of "Nada," an outspoken Saudi Arabian woman, who refused to wear a veil and desired a profession, but was subjected to harassment and an attempt by the religious police to arrest her). When she attempted to enter Canada, however, officials told her to return home, observe her country's laws, and to consider the feelings of her father. *Id.*

12. U.S. refugee/asylum law continues to have a political and ideological double standard for refugees fleeing non-communist countries, despite passage of the 1980 Immigration and Nationality Act and its legislative history. This ideological and political bias has been widely criticized in this country, and referred to as an "unfulfilled promise." See, e.g., Mark Gibney, *A "Well Founded Fear" of Persecution*, 10 HUM. RTS. Q. 109, 111 (1988); Arthur Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 243 (1984).

surprisingly, while statistics on the numbers of refugees and asylum applicants each year are easily available,<sup>13</sup> gender statistics are not.<sup>14</sup> This reflects the federal government's general lack of attention to women's unequal treatment in refugee/asylum law.<sup>15</sup> Part I concludes with an explanation of the critical importance of gender analysis in refugee/asylum law.

Part II summarizes the different forms of gender bias evident in refugee/asylum law. Different, substantive types of sex-based persecution are excluded from protection. Women seeking refugee and asylum resettlement for gender-based persecution such as domestic violence, female genital surgery,<sup>16</sup> sex slavery, forced marriage, forced abortion, and rape have been denied refugee and asylum protection. Part II also examines the gender bias in the procedural aspects of refugee/asylum law and discusses how race and class can intersect with gender to either temper or worsen the extent of gender-related persecution.

In order to correct gender bias, changes to refugee/asylum law and policy are necessary. Part III outlines four proposals supporting asylum eligibility for aliens with valid claims of gender-related persecution. First, we might classify women contesting gender-related abuse as persecution on account of membership in a particular social group. Second, we could reconsider the political opinion category as the Ninth Circuit has done in *Lazo-Majano*.<sup>17</sup> Third, we could attempt to rethink the meaning of persecution by liberalizing the

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13. U.S. Committee for Refugees, *1988 World Refugee Statistics*, WORLD REFUGEE SURVEY 1988 IN REVIEW 32 (1988) (compiling statistics according to country of origin).

14. Letter from Bill Frelick, Senior Policy Analyst, U.S. Committee for Refugees, to Sunny Kim 1 (June 30, 1993) (on file with *The American University Journal of Gender and the Law*) (stating that "[t]here are no statistics concerning asylum seekers with a breakdown according to gender."); see also U.S. IMMIGRATION AND NATURALIZATION SERVICE, STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (1990) (indicating that while statistics are available on refugees and asylees granted permanent residence, about 53 percent men and 47 percent women, there is no such data available regarding applications).

15. See *Report of the Commission on the Status of Women* U.N. Economic and Social Council, 34th Sess., Agenda Item 4(c), at 1-2, U.N. Doc. E/CN.6/1990/L.5 (1990) (expressing concern that an estimated sixteen million refugees in the world, primarily from developing countries, are mostly women and children, and recommending the convening of an expert group to report on the importance of the legal and physical protection of refugee women, the need to increase efforts to respond to these problems, and to involve the women themselves in the planning and implementation of solutions).

16. See Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: the Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 192-93 n. 15 (1991-1992) (choosing the term "genital surgery" because genital "mutilation" suggests a negative moral assessment that is damaging to relations between Western and non-Western women and because female "circumcision" inaccurately connotes a mild operation comparable to male circumcision).

17. *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987) (involving the asylum claim of Lazo-Majano, a domestic worker who was repeatedly raped by her employer, a low-ranking member of the Salvadoran military, *Fuerza Armada*).

construction of the five enumerated categories of race, religion, nationality, membership in a social group, and political opinion. Fourth, we may create a sixth enumerated category of sex. Part III concludes by acknowledging the current political climate, the recent negative media attention on asylees, and the overall pessimistic economic forecast as the main barriers to refugee/asylum law reform.

## I. INADEQUACIES IN TRADITIONAL REFUGEE/ASYLUM LAW

### A. *Veiled Male Standards in International Law*

Although there is a wealth of feminist literature on a wide range of disciplines and subjects,<sup>18</sup> the area of international relations has generally been noted for receiving comparatively little feminist attention. Scholars have begun to criticize and question the paucity of feminist literature in the area of international law.<sup>19</sup> They have noted that “[i]nternational relations, like many other disciplines, has operated with a relatively narrow conception of what is relevant to its subject matter. Excluded from that conception, quite comprehensively, is the experience of most women.”<sup>20</sup>

At a theoretical level, the traditional concept of fundamental and universal human rights presupposes gender equality and neutrality. For example, human rights has traditionally been defined as “men’s inalienable right to life, liberty, and property.”<sup>21</sup> Although the term “men” arguably includes women, thereby referring to all humanity, neither human rights theory nor its application has successfully evidenced this assertion.<sup>22</sup> The segregation of women’s rights from human rights has only reinforced the fact that traditions which violate the rights of women are not challenged under the human rights umbrella.<sup>23</sup> In practice, violating women’s basic rights involves a combination of gender-related physical, psychological and social

18. See generally Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); CATHARINE MACKINNON, *FEMINISM UNMODIFIED* (1987); THE LEGAL RELEVANCE OF GENDER: SOME ASPECTS OF SEX-BASED DISCRIMINATION (Sheila McLean & Noreen Burrows eds., 1988).

19. See generally GENDER AND INTERNATIONAL RELATIONS 1 (Rebecca Grant & Kathleen Newland eds., 1991); Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613, 614 (1991) (pointing out that “[i]nternational law is a thoroughly gendered system”).

20. GENDER AND INTERNATIONAL RELATIONS, *supra* note 19, at 1.

21. Riane Eisler, *Human Rights: Toward an Integrated Theory for Action*, 9 HUM. RTS. Q. 287, 288 (1987) (emphasis added).

22. *Id.*

23. *Id.* at 291.

factors which reflect systems of gender oppression and gender social structuring.<sup>24</sup>

Rebecca Grant, author and member of the Political Science Department of the Rand Corporation, argues in her book, *Gender and International Relations*, that gender bias in international relations theory stems from a foundation of political concepts that "eliminate women from the prevailing definitions of man as political actor."<sup>25</sup> She argues that "[i]n the Western tradition, men, not women, are the models for political theory."<sup>26</sup> Politics itself may be the archetype of maleness—assertive, opinionated and requiring a high degree of toughness, self-confidence and competitiveness.<sup>27</sup> Because of women's social role, some feel that women and power are dangerously incompatible and that forcing women into politics could create dissonance for citizens, including the women themselves.<sup>28</sup>

Despite the fact that there are as many women suffering persecution world-wide, men appear to gain asylum status with less difficulty than women.<sup>29</sup> The problems of gender bias in refugee/asylum law are parallel to other types of gender bias. The classifications and guidelines shaping the law were formulated by men with men in mind. The injustice this creates for women is intensified by the fact that men as a group are more economically and politically empowered. These factors work against women seeking asylum in order to escape from the persecution in their own countries. To understand the reforms necessary to alleviate these problems, a general understanding of the current system is necessary.

### B. *An Overview of U.S. Refugee/Asylum Law*

Catharine MacKinnon's assertion that "[n]o woman had a voice in the design of the legal institutions that rule the social order under

24. Jessica Neuwirth, Symposium Address, *Towards a Gender-Based Approach to Human Rights Violations*, 9 WHITTIER L. REV. 399, 406 (1987).

25. Rebecca Grant, *The Sources of Gender Bias in International Relations Theory*, in GENDER AND INTERNATIONAL RELATIONS 1, 9 (Rebecca Grant & Kathleen Newland eds., 1991).

26. *Id.*

27. Elizabeth Vallance & Elizabeth Davies, *Where are the Women?*, in WOMEN OF EUROPE: WOMEN MEPS AND EQUALITY POLICY 1, 4 (1986) (noting that many people doubt that women can be effective leaders in the political arena).

28. See Joel Achenbach, *Why Things Are: Why Does the Queen in the Game of Chess Have So Much Power, While the King Can Only Stumble Around One Square at a Time?*, THE ATLANTA J. & CONST., Mar. 26, 1993, at G3 (analogizing chess pieces to Bill and Hillary Clinton and explaining the evolving role of the queen through the history of chess); see also Wesley Pruden, *Shocking Scarcity of Lady Killers*, WASH. TIMES, Nov. 29, 1991, at A4 (describing Representative Pat Schroeder as a "foot-stamping crybab[y]" in an article discussing the debate over women in the military).

29. See Thompson, *supra* note 7.

which women, as well as men live"<sup>30</sup> is applicable to key concepts in refugee/asylum law. In everyday usage, the term "refugee" has a broad meaning, denoting an individual in flight who attempts to flee intolerable conditions or personal circumstances.<sup>31</sup> As a legal term of art, however, "refugee" has a much narrower meaning. The United States definition of refugee closely resembles the United Nations' definition<sup>32</sup> of refugee:

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in such case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country *because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.*<sup>33</sup>

Generally, laypeople refer to all persons fleeing dangerous situations as refugees; however, they will only qualify for refugee status if they meet the legal definition quoted above.

The five enumerated categories of race, religion, nationality, membership in a particular social group, or political opinion are purportedly gender neutral. Indeed, they are facially gender neutral. Theoretically, women who fit the current description of refugee may successfully claim refugee or asylum protection. Nevertheless, within this presumably neutral framework, there has been little discussion devoted to human rights violations against women.<sup>34</sup> Instead, the laws that pretend to be gender neutral actually reflect male norms.

Like the everyday usage of refugee, the layperson's understanding of "persecution" is much broader than its narrow definition. U.S. refugee/asylum law requires that two standards be met: 1) there must be a *well-founded fear* of persecution, and 2) the persecution must be *on account of* one of the five enumerated categories.<sup>35</sup> While the

30. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1281 (1991).

31. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 1 (1983).

32. 114 Cong. Rec. 27,758, 27,844 (1968); S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 8 (1968) (stating that the United States became a party to the 1967 Protocol Relating to the Status of Refugees and consented to most of the provisions of the 1951 Convention which are two international instruments that guide refugee status on a global level; see HUMAN RIGHTS: SIXTY MAJOR GLOBAL INSTRUMENTS 194, 225 (Winston E. Langley ed., 1992) (containing a reprint of the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees)).

33. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101 (1988) (emphasis added) [hereinafter INA].

34. Neuwirth, *supra* note 24, at 399.

35. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1988) (emphasis added).

office of the United Nations High Commissioner for Refugees (UNHCR)<sup>36</sup> has moved away from requiring persecution to fit narrowly into one of the five enumerated categories of race, religion, nationality, membership in a particular social group, or political opinion, the United States has continued its strict reading. U.S. immigration officials often argue for a strict interpretation of persecution to avoid flooding the American gates with refugees.<sup>37</sup>

Asylum procedures in the United States is governed by international law and domestic law relating to refugees.<sup>38</sup> All refugees cannot attain asylum status because all refugees do not meet the statutory requirements for asylum protection. The difference between refugees and asylees is based on the country to which they apply.

Generally, before reaching the United States, people in exile apply and are processed for refugee status at designated locations; usually foreign consular posts or offices of the U.S. Immigration and Naturalization Service (INS).<sup>39</sup> If refugee status is approved, the aliens are admitted to the United States as refugees, becoming eligible for adjustment of status to permanent residence one year from their admission date.<sup>40</sup> A ceiling on the number of refugees to be admitted is designated by the President each fiscal year after congressional consultation.<sup>41</sup>

Asylum applicants, on the other hand, apply and are processed in the United States after they have entered the country or are at the border.<sup>42</sup> Therefore, to qualify for asylum, the alien must be physically present in the United States or at a land border or port of entry *and* must meet the term refugee as defined by section 101(a)(42) of the Immigration and Nationality Act.<sup>43</sup> An alien can

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36. "In 1951, the U.N. General Assembly created the office of the United Nations High Commissioner for Refugees (UNHCR) as the primary United Nations organization responsible for protection of refugees and the development of long-term solutions to refugee situations . . . . In ratifying the 1967 Protocol, the United States agreed to cooperate with UNHCR in matters pertaining to refugee protection and implementation of the protocol." OFFICE OF THE UNITED STATES HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, at 4, U.N. Doc. HCR/IP/4 (1988). The UNHCR Handbook contains explanations of asylum adjudication issues and is recognized as a valuable guide in determining asylum claims; however, the Handbook is not legally binding on U.S. asylum adjudication. *Id.* at 13.

37. *See, e.g.*, Gregg A. Beyer, *Affirmative Asylum Adjudication in the United States*, 6 GEO. IMMIGR. L.J. 253, 271 (1992); Gibney, *supra* note 12, at 114.

38. *See* INA § 101(a)(42), 207, 208, 209, 243(h) (stating the principal provisions of United States refugee/asylum law).

39. AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, *IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE* 6-1 (1992).

40. INA § 209(a), 8 U.S.C. § 1159(a) (1988).

41. INA § 207(a)(2), 8 U.S.C. § 1157(a)(2) (1988).

42. INA § 208, 8 U.S.C. § 1158 (1988).

43. *Id.*



seek asylum from an immigration judge once deportation or exclusion<sup>44</sup> proceedings have begun.<sup>45</sup> If an alien is already present in the United States and has not been deleted by the INS, she/he may file an affirmative asylum claim.<sup>46</sup>

There are several stages in the asylum process.<sup>47</sup> The first step, in an affirmative asylum claim, is to file an application (Form I-589).<sup>48</sup> Then, there is an interview with an asylum officer who provides a written decision.<sup>49</sup> If the asylum officer denies the application for asylum, the applicant will be placed in deportation proceedings. In deportation and exclusion proceedings before an immigration judge, an alien may apply for political asylum, even if the alien has already applied for asylum.<sup>50</sup> Then, if the immigration judge issues a unfavorable decision, there is the possibility of an appeal with the Board of Immigration Appeals (BIA).<sup>51</sup> The final step is usually a petition for review of the final order of deportation, or asylum denial, to a U.S. Court of Appeals.<sup>52</sup> The application process is slow and can take years before even completing the second stage, the interview with an asylum officer.<sup>53</sup>

Most of the refugee and asylum laws described above are the result of the Refugee Act of 1980 (1980 Act).<sup>54</sup> The Act was passed after

44. See INA § 243(h) (explaining the withholding of deportation relief which an alien claiming persecution can receive); INA § 208(a) (explaining the alternative option of asylum relief which an alien can seek and which has an easier standard than deportation relief); INS v. Stevic, 467 U.S. 407 (1984) (holding that an alien seeking relief from deportation on grounds that he would be subject to persecution in his country must establish a clear probability of persecution to avoid deportation under 243(h)); cf. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (holding that an alien seeking asylum need not prove that it is "more likely than not" that he or she will be persecuted in his or her country to show well founded fear of persecution for asylum relief under § 208(a)).

45. Withholding of deportation is a mandatory relief if the alien qualifies. Asylum, however, is a discretionary relief. INA § 208(a), 8 U.S.C. § 1158; 8 C.F.R. § 208.2 (1993).

46. See 8 C.F.R. §§ 208.16, 236.3 (1993).

47. See generally Deborah E. Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims Before the Immigration Court*, 2 INT'L J. REFUGEE L. 252 (1990).

48. 8 C.F.R. § 208.4(a) (1993).

49. 8 C.F.R. § 208.9 (1993).

50. 8 C.F.R. § 208.2(b) (1993) (stating that an immigration judge must make de novo determinations on asylum applications even when applications were previously filed and decided administratively by asylum officers).

51. FRAGOMEN, *supra* note 39, at 8-1.

52. INA § 106(a), 8 U.S.C. § 1105(a) (1988).

53. See Gregg A. Beyer, *Affirmative Asylum Adjudication in the United States*, 6 GEO. IMMIGR. L.J. 253, 277-78 (1992) (reporting that applicants may remain in a "limbo" status of "asylum-seeker, work authorized" for three to five years before being granted an asylum interview with the INS, which delays a resolution of the legality of their status in this country). Aliens who are eventually determined ineligible for asylum are given an opportunity to work in the United States for several years which effectively thwarts the immigration policy against unlawful or undocumented aliens seeking employment. *Id.*

54. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 107.

decades of piecemeal legislative action on the issue of refugees and asylees.<sup>55</sup> Before the 1980 Act was passed, U.S. refugee admissions were limited by statute to assist refugees from countries in the Middle East and those from communist countries.<sup>56</sup> Ideological and political considerations, rather than the plight of the refugees themselves, were the paramount concern in determining which refugees would be admitted to the United States.<sup>57</sup>

Fortunately, the 1980 Act established a comprehensive program in the United States for refugee and asylum admissions.<sup>58</sup> The goals of the 1980 Act were to establish the mechanisms for determining who is a refugee, the procedures for their admission, and the procedures for granting asylum to foreign nationals already present in the United States.<sup>59</sup>

Unfortunately, statistics on the countries of origin of successful asylum applicants since the 1980s indicate that the 1980 Act did not change the former geographical or ideological bias of pre-1980 refugee/asylum policy.<sup>60</sup> For example, in the 1980s, Eastern Europeans gained asylum in the United States, while Salvadorans, Guatemalans,<sup>61</sup> and Haitians did not.<sup>62</sup> Gregg A. Beyer, INS Director of Asylum, readily concedes that "current refugee processing probably mirrors the ideological predispositions of the pre-1980 refugee definition more closely than it should."<sup>63</sup> The United States has been preoccupied with the political and ideological biases in refugee/asylum law, attempting to address the geographic prejudices, while paying much less attention to gender bias.

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55. See FRAGOMEN & BELL, *supra* note 39; Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 S.D. L. REV. 9 (1981).

56. FRAGOMEN & BELL, *supra* note 39, at 6-4.

57. See Beyer, *supra* note 53, at 261 (noting that the passage of the 1980 Act has not modified the statistics of successful applicants based on countries of origin).

58. Refugee Act of 1980, *supra* note 54.

59. Refugee Act of 1980, *supra* note 54.

60. See U.S. Committee for Refugees, *supra* note 13 (containing the world refugee statistics and country reports that are issued annually by the U.S. Committee for Refugees).

61. See ROBERT TOMSHO, *THE AMERICAN SANCTUARY MOVEMENT 207* (1987) (comparing the lack of "welcome" from Washington to Salvadorans and Guatemalans seeking refuge in the United States to the U.S. policy of turning away European Jews who sought refuge in the United States during World War II); Gibney, *supra* note 12 at 112 (1988) (describing a grassroots humanitarian movement or "sanctuary" movement that has sprung up to protest the United States' refugee/asylum policy for Guatemalans and Salvadorans and has resulted in the creation of sanctuary sites throughout the United States).

62. Al Kamen, *High Court Will Hear Haitian Refugees' Case*, WASH. POST, Dec. 4, 1984, at A3 (stating that "[b]etween 35,000 and 45,000 Haitians have arrived illegally in South Florida since December, 1972 and the INS—treating them as economic, not political refugees—started jailing new arrivals in 1981. Most of those jailed have been deported or released to U.S. 'sponsors' during pending hearings on their status.").

63. Beyer, *supra* note 53, at 261.

### C. *The Importance of Gender Analysis in Refugee/Asylum Law*

Despite the fact that most of the world's refugees are female, scholarly and political criticism of refugee/asylum law has rarely focused on gender bias.<sup>64</sup> Questioning why this void exists is invaluable to the feminist efforts to gain protections for women. Feminists have discovered in many areas—employment, family, criminal justice system, and property rights—that the standards designed by men for men need to be redesigned to accommodate both sexes.<sup>65</sup> Any novel human rights theory will require both a female and male yardstick to ensure the protection of the human rights of *all* people.<sup>66</sup> Simply making sure that female refugees are treated the same as male refugees is not an adequate solution. As one author notes, “[g]ender cannot be reduced to an afterthought. What is needed is a much more radical approach which recognizes that standards have been historically ‘gendered’ from the start.”<sup>67</sup> The traditional standards must be questioned and reviewed.

Furthermore, the failure to consider gender issues in world development policies has resulted in unsatisfactory and even disastrous consequences.<sup>68</sup> Some efforts have been made by the United Nations to “make women matter.”<sup>69</sup> Article 8 of the United Nations Charter was added at the insistence of the Committee of Women’s Organizations. Article 8 provides that “[t]he United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality

64. See RAMCHARAN *supra* note 9 and accompanying text.

65. See, e.g., SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975) (providing a thorough and fascinating history of rape in different times and in different locales); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623 (1980) (explaining the existence of gender bias in domestic violence cases which are treated as self-defense cases that require imminent danger and exclude expert testimony on the Battered Woman Syndrome); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979) (recognizing the failure of society to recognize sexual harassment as abuse and advancing the argument that sexual harassment of women at work is sex discrimination in employment); Joan C. Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991) (reframing work/family issues that often divide women between the homemaker and career women camps).

66. Eisler, *supra* note 21, at 297.

67. HARRIET BRADLEY, *MEN’S WORK, WOMEN’S WORK: A SOCIOLOGICAL HISTORY OF THE SEXUAL DIVISION OF LABOUR IN EMPLOYMENT* 67 (1989).

68. See generally ESTER BOSERUP, *WOMAN’S ROLE IN ECONOMIC DEVELOPMENT* (1970) (documenting the seriousness of omitting the problems of women in policy development and asserting that development strategies in the 1970s did not anticipate the negative impact on women).

69. See generally NÜKET KARDAM, *BRINGING WOMEN IN: WOMEN’S ISSUES IN INTERNATIONAL DEVELOPMENT PROGRAMS* (1991); HILKKA PIETILÄ & JEANNE VICKERS, *MAKING WOMEN MATTER: THE ROLE OF THE UNITED NATIONS* (1990).

in its principal and subsidiary organs."<sup>70</sup> As Hilary Charlesworth, senior lecturer at the University of Melbourne Law School, notes, however, Article 8 was framed in the negative, and failed to create an affirmative obligation to include women.<sup>71</sup>

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was the first U.N. document to recognize that violations of women's human rights are still overlooked.<sup>72</sup> Article 1 of CEDAW expressly calls for the international recognition of women's human rights both inside and outside their traditional private or familial sphere.<sup>73</sup> Article 5 of the Convention addresses the traditional justification of denying human rights to women on the basis of ethnic customs or practices.<sup>74</sup>

In 1975, the General Assembly of the United Nations declared an International Women's Year, followed by a Women's Decade which culminated in 1985 with a major conference in Nairobi.<sup>75</sup> This Decade for women, however, "has been widely branded as a failure because of the diversion of attention from women's problems to general political issues."<sup>76</sup> International institutions still exclude women from all major decision-making on global policies and guidelines, despite the disparate impact those decisions often have on them. Of course, this scenario is not unfamiliar. A quick glance at a few domestic governing bodies such as the United States Senate and House of Representatives,<sup>77</sup> and the European Parliament,<sup>78</sup> demonstrates that women are greatly underrepresented in government.

70. See U.N. CHARTER art. 8; see also Charlesworth, Chinkin & Wright, *supra* note 19, at 622.

71. See Charlesworth, Chinkin & Wright, *supra* note 19, at 622.

72. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, U.N. DOC. A/34/46 (1979), reprinted in HUMAN RIGHTS: SIXTY MAJOR GLOBAL INSTRUMENTS, *supra* note 4, at 64 [hereinafter CEDAW].

73. HUMAN RIGHTS: SIXTY MAJOR GLOBAL INSTRUMENTS, *supra* note 4, at 65.

74. HUMAN RIGHTS: SIXTY MAJOR GLOBAL INSTRUMENTS, *supra* note 4, at 66.

75. See THE NAIROBI FORWARD LOOKING STRATEGIES FOR THE ADVANCEMENT OF WOMEN, U.N. DOC. A/RES./46/98 (1985); see also Kathleen Newland, *From Transnational Relationships to International Relations: Women in Development and The International Decade for Women*, in GENDER AND INTERNATIONAL RELATIONS 122, 127 (Rebecca Grant & Kathleen Newland eds., 1991).

76. Newland, *supra* note 75, at 128.

77. See generally Irene Diamond, *Female Legislators: Where Are They?*, in SEX ROLES IN THE STATE HOUSE (1977); SUSAN CARY NICHOLAS, ALICE M. PRICE & RACHEL RUBIN, RIGHTS AND WRONGS: WOMEN'S STRUGGLE FOR LEGAL EQUALITY xxi (1986) (acknowledging that although more women are infiltrating the American legal and political world, they remain "sorely underrepresented in the more powerful positions of our federal and state governments").

78. See generally Vallance & Davies, *supra* note 27, at 1 (analyzing the economic, social and historical reasons women are underrepresented in the position of MEP, Member of the European Parliament).

Nevertheless, the familiarity of this unequal representation does not make this status quo acceptable, or immutable.<sup>79</sup>

## II. GENDER-RELATED PERSECUTION IN REFUGEE/ASYLUM LAW

### A. *Examples of Gender-Related Persecution*

Organizations such as Amnesty International have begun to expand the scope of their mandate to explicitly include the human rights violations against women. In the 1990 publication, *Women in the Front Line: Human Rights Violations Against Women*, Amnesty International states:

The list of such gross human rights violations against women is endless. Many are targeted because they are strong—because they are political activists, community organizers, or persist in demanding that their rights or those of their relatives are respected. Others are targeted because they are seen as vulnerable . . . women who can be used to get at men, or refugee women who are isolated and vulnerable in unfamiliar surroundings.<sup>80</sup>

The report further explains that “[w]omen also face human rights violations solely or primarily because of their sex.”<sup>81</sup> The current definition of refugee fails to recognize that in some countries “women face persecution simply because they are women.”<sup>82</sup>

Rape and other forms of sexual attack or humiliation which are frequently used as a form of torture are most often inflicted on women detainees.<sup>83</sup> In several United States asylum cases, women have alleged that they experienced rape as persecution.<sup>84</sup> In one case, *Campos-Guardado*, a group of guerilla fighters in El Salvador sexually assaulted Sofia Campos-Guardado after brutally murdering

79. See Catharine A. MacKinnon, *supra* note 30, at 1296 (stating that “[t]he worse the inequality is, the more like a difference it looks.”).

80. AMNESTY INTERNATIONAL, *supra* note 3, at 1. This report, however, is not a comprehensive account of all human rights violations against women. Amnesty International’s expanded mandate is still limited to seeking the release of prisoners of conscience; to working for prompt and fair trials for all political prisoners; to opposing the death penalty, extrajudicial executions and torture.

81. AMNESTY INTERNATIONAL, *supra* note 3, at 52.

82. Jacqueline R. Castel, *Rape, Sexual Assault and the Meaning of Persecution*, 4 INT’L J. REFUGEE L. 39, 40 (1992).

83. AMNESTY INTERNATIONAL, *supra* note 3, at 2 (assessing the conditions under which rape and sexual assault should constitute persecution within the meaning of the United Nations Convention definition of refugee).

84. See *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987) (affirming a Board of Immigration decision to deny asylum because Campos-Guardado had failed to show that the harm she feared was on account of political opinion or membership in a social group); see also *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987) (reversing the order from the Board of Immigration Appeals and granting this rape victim asylum under the political opinion category).

her male relatives, including her uncle, who was a chairperson of an agricultural cooperative formed as a result of the controversial agrarian reform movement.<sup>85</sup> Ms. Campos-Guardado suffered a nervous breakdown and had to be hospitalized for fifteen days. One of the attackers proceeded to harass her by threatening to kill her if she ever revealed his identity as her rapist. Afraid to return to her home, Campos-Guardado finally fled El Salvador and eventually applied for asylum in the United States.<sup>86</sup> In the case of *Lazo-Majano*,<sup>87</sup> a low-ranking member of the *Fuerza Armada*, the Salvadoran military, employed Lazo-Majano as a domestic worker and repeatedly assaulted her while she was in his employment.<sup>88</sup> This employer, Rene Zuniga, assaulted her at gunpoint. On other occasions, he held hand grenades to her forehead, threatening to explode them if she resisted his advances. He also threatened to torture her physically and kill her if she ever told anyone of his actions. Although this physical and psychological torture was not part of Zuniga's official duties, Lazo-Majano believed he could do whatever he wanted to her with impunity. She believed that no one would get involved with a member of the armed forces. In addition, Zuniga had warned her that he could avoid punishment for his actions against her by denouncing her as a subversive. As a result, Lazo-Majano believed she could not escape Zuniga's torture while in El Salvador. She believed the power of the armed forces was so great that they would support his actions of rape and allow him to carry out his threat of killing her unpunished. Therefore, like Campos-Guardado, Lazo-Majano left El Salvador for the United States and applied for asylum.<sup>89</sup>

Are there any objections to recognizing rape as persecution? One possible objection to the recognition of rape and other acts of violence against women as persecution is the near universal occurrence of rape. Nevertheless, such a floodgates argument fails because the other enumerated categories of race, religion and nationality are equally broad and universal bases for persecution. Irrespective of how many in a group are subjected to the same or similar measures, each

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85. Campos-Guardado, 809 F.2d at 287 (describing how guerillas forced Campos-Guardado to watch as they chopped the flesh from the bodies of her uncle and male cousin with machetes and then raped her and her female cousin).

86. *Id.*

87. Lazo-Majano, 813 F.2d at 1432.

88. *Id.* at 1433.

89. *Id.*

individual subjected to measures of such gravity must be recognized.<sup>90</sup>

Rape is often used as a conscious form of persecution in countries where vast human rights violations exist.<sup>91</sup> The willingness of nations to protect women from rape differs from country to country. Well-founded fear of persecution should be found to exist in every instance in which the country where the rape occurred does not have an effective prosecutorial system available to women, or the woman's life would be endangered by bringing the issue to the attention of authorities. After all, by the U.S. government's own definition, a refugee is a person "who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country."<sup>92</sup>

Female sexual slavery is another gendered form of a human rights violation.<sup>93</sup> Other practices include bride-payment, forced marriages, extremely severe punishment for unveiling, genital surgery,<sup>94</sup> female infanticide,<sup>95</sup> and "honor" murders.<sup>96</sup> Women may also be stoned or burned to death for not bringing a large enough dowry to the marriage.<sup>97</sup>

Some women are subjected to human rights violations merely because they are the wives, mothers, daughters or friends of people

90. See GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 213 (1966).

91. See *supra* notes 1-2 and accompanying text (describing Balkan rapes and Japan's use of comfort women).

92. 8 U.S.C. § 1101(a)(42)(A).

93. See *supra* notes 1-2 and accompanying text (stating that sexual slavery has been documented in the rape camps in Bosnia and during Japan's occupation of its neighboring Asian nations 47 years ago); Eisler, *supra* note 21, at 306 (stating that there are reports of international networks that traffic and sell women into prostitution and other sexual markets).

94. See Alison T. Slack, *Female Circumcision: A Critical Appraisal*, 10 HUM. RTS. Q. 439, 440-41 (1988) (describing four types of increasing severity of physical and psychological trauma: 1) ritualistic circumcision, where the clitoris is merely nicked; 2) "sunna," as Muslims call it, which involves removal of the clitoral prepuce, but leaves the gland and the body of the clitoris intact; 3) excision or clitoridectomy, which is the removal of the gland of the clitoris; and 4) infibulation or "pharaonic" circumcision, where virtually all of the external female genitalia are removed).

95. See, e.g., John W. Anderson, *The Missing Millions: Deadly Discrimination Leads to High Mortality Rate*, WASH. POST, Feb. 14, 1993 at A48; Michelle Landsberg, *Human Rights Must Include Woman's Right to Escape Abuse*, TORONTO STAR, Sept. 12, 1992, at G1 (noting that female infanticide was one of the methods used to kill 100 million women in Africa and Asia who are deemed to be "missing").

96. Eisler, *supra* note 21, at 301 n.33 (stating that families frequently kill, with impunity, girls suspected of dishonoring the family).

97. See David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 5 COLUM. HUM. RTS. L. REV. 203, 206 (1988) (pointing out that some women are stoned or burned for not bringing enough dowry are not granted refugee status); see also Jacquie Miller, *Feminist Refugee Can Stay; Strong Message to Decision Makers*, OTTAWA CITIZEN, Jan. 30, 1993, at A1.

whom the authorities consider to be dangerous or undesirable.<sup>98</sup> These women are threatened, held as substitutes for their relatives, tortured, or killed, as governments attempt to exert their will over those closely connected to them. For example, in Turkey, the wife of Ramazan Velieceoglu was detained and threatened with torture in an effort to force Ramazan to confess to membership in an illegal organization.<sup>99</sup> Although Ramazan might qualify for asylum protection on account of persecution for membership in a particular social group, Ramazan's wife would not qualify for a claim of persecution on account of race, nationality, religion, membership of a social group, or political opinion.

### *B. Persecution and the Public/Private Distinction*

One way of analyzing these various forms of gender-related persecution which women experience is to assess the traditional public/private distinction. In Western liberal democratic thought, the private sphere is that which is unregulated by the government, embodied in the adage "a man's home is his castle."<sup>100</sup> One consequence of this public/private distinction is that persecution is conceptualized as occurring in the public sphere in accordance with male normative conceptions of oppression and resistance.<sup>101</sup> Thus, under the current refugee/asylum law, persecution against women is recognized, but only insofar as such persecution fits the male norm, or public sphere, of what it means to have a well-founded fear of persecution. Women, however, more often experience persecution in the private sphere.<sup>102</sup>

This traditional private/public rationale for human rights violations is unacceptable because it fails to recognize persecution against many women. The viewpoint that the private sphere should be left alone is the equivalent of governments' position that their actions within the confines of their nations are strictly an internal affair; a viewpoint which human rights advocates have rejected explicitly.<sup>103</sup> Human rights advocates should further refuse to support the traditional tenet

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98. This fact is acknowledged in Canada's new guidelines on gender-related persecution. See IMMIGRATION AND REFUGEE BOARD, WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION: GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT (1993) [hereinafter GUIDELINES].

99. See AMNESTY INTERNATIONAL, *supra* note 3, at 15.

100. See Felicite Stairs & Lori Pope, *No Place Like Home: Assaulted Migrant Women's Claims to Refugee Status and Landings on Humanitarian and Compassionate Grounds*, 6 J. L. & SOC. POL'Y 148, 182-187 (1990).

101. *Id.*

102. *Id.*

103. Eisler, *supra* note 21, at 290.



that the male head of the family is entitled to rule over his women and children without any outside interference in his private domain.<sup>104</sup> If there is a sphere which the state does not regulate, men will delegate.<sup>105</sup> The state is inevitably implicated in failing to protect women endangered in their home, thus blurring even more the public/private distinction. Perhaps the public/private dichotomy argument is still useful, although not conclusive, to describe the public/private dichotomy as a shifting social construction in different cultures.<sup>106</sup> This dichotomy, however, should not be a barrier to recognizing the particular forms of persecution women continue to suffer.

All of the aforementioned cultural, social, and moral rationales for continued practices that violate women's rights are further imbued with race and class biases. Although this paper focuses on gender, an analysis of gender bias in asylum law is incomplete without recognizing the interconnectedness of race and class issues with gender. The anti-essentialist movement, which emphasizes the need to recognize that race and class are intertwined with gender, is an important vein within feminist jurisprudence.<sup>107</sup> A line from an Audre Lorde poem states this need well: "But I who am bound by my mirror as well as my bed see causes in Color as well as sex."<sup>108</sup>

An example of the relevance of race and class to an analysis of gender-related persecution is the violence against women in Peru.<sup>109</sup> Although rape is a risk for *all* women, a woman's class, race, or economic status make a difference in how the woman is raped and in her opportunities to prosecute her attacker.<sup>110</sup> *Mestizos* (white men)

104. Eisler, *supra* note 21, at 290.

105. Stairs & Pope, *supra* note 100, at 182-87.

106. See Marilyn Porter, *Women and Old Boats: The Sexual Division of Labour in a Newfoundland Outport*, in *THE PUBLIC AND PRIVATE* 91 (Eva Gamarnikow et al. eds., 1983) (explaining the view of sociologists Gamarnikow and Purvis that "[t]he public/private split is a metaphor for the social patterning of gender, a description in sociological practice, and a category grounded in experience.").

107. See, e.g., *RACE-ING JUSTICE, EN-GENDERING POWER* (Toni Morrison ed., 1992) (providing a collection of feminist essays that explain how the story of the Anita Hill—Clarence Thomas hearings became either a story about the harassment of a white woman or a story of the harassment of a black man); Angela P. Harris, *Race and Essentialism*, 42 *STAN. L. REV.* 581, 585 (1990) (criticizing "gender essentialism" which she describes as "the notion that a unitary 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience").

108. AUDRE LORDE, *CHOSEN POEMS: OLD AND NEW* 50 (1982).

109. AMERICA'S WATCH, *supra* note 3, at 58.

110. See AMERICA'S WATCH, *supra* note 3, at 18.

rape *cholas* (Indian women), not the other way around. In most cases, women identified as *chola* receive the most brutal treatment.<sup>111</sup>

### C. Procedural Gender Bias

At refugee determination hearings, women with gender-related claims of persecution face additional burdens when they are called upon to state their claim and speak of experiences that are often difficult and humiliating.<sup>112</sup> When torture or persecution takes the form of sexual humiliation and/or rape, survivors of particularly traumatic events can experience a form of psychological illness that the medical community terms post-traumatic stress disorder (PTSD) or Rape Trauma Syndrome.<sup>113</sup> If the victim comes from a society that treats the subject of sex and sexual organs as taboo or simply improper, and if her native country is repressive about women's rights, she will probably be even more wary about testifying.<sup>114</sup>

Conditioned to believe that her word has no weight, a woman refugee may repeatedly deny that any sexual abuse occurred; especially when questioned by a male attorney. The often necessary presence of an interpreter, who may be from the women refugee's native country, can also inhibit the applicant's testimony. The sufferer may avoid stimuli associated with the trauma and may appear withdrawn, uninterested, and detached.<sup>115</sup> The physical, emotional, and cognitive symptoms that accompany PTSD can reduce an asylum applicant's credibility before a trier of fact unless these symptoms are understood and explained. Expert medical reports and testimony can help improve an asylum applicant's case by corroborating the applicant's story of persecution, enhancing the applicant's credibility, and helping judges and attorneys understand the effects of such

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111. AMERICA'S WATCH, *supra* note 3 at 18 (explaining that the term "tumbachola" is a common barroom joke meaning to knock down a peasant woman and rape her).

112. Cultural or social circumstances sometimes render women particularly isolated by the human rights violations they experience. They may choose not to report humiliating assaults by government agents because they fear this will result in reprisals from their own families, traumatic social repercussions or further attacks by government officials. Also, women are discouraged because they know that the state and government officials will simply not do anything, except to perhaps blame the victim. This is particularly true of rape.

113. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 247 (3d ed. 1987) [hereinafter DSM-III-R].

114. See LEE MADIGAN & NANCY C. GAMBLE, THE SECOND RAPE (1989) (explaining that systemic challenges to the rape victim's credibility and accusations of fault to the rape victim results in a "second rape" perpetrated by society).

115. *Id.* at 5.

trauma on the applicant's current behavior, memory, understanding, and demeanor.<sup>116</sup>

Reform of refugee/asylum law becomes imperative after recognizing that women experience gender-based persecution and that current refugee/asylum law fails to adequately address gender-based asylum claims. Part III outlines four proposals to attempt to improve the asylum eligibility for women.

### III. WHAT NEEDS TO BE DONE

#### A. *Overcoming the Self-Determination or Culture Defense*

While the culture defense is truly faulted, it is nonetheless a powerful argument for the exclusion of persecution suffered by women under the rubric of human rights violations.<sup>117</sup> Article 5 of the Convention on the Elimination of All Forms of Discrimination Against Women recognizes the importance of addressing the denial of human rights to women on the basis of ethnic customs or practices:

States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>118</sup>

The real issue is not whether ethnic traditions should or should not be within the purview of human rights theory and action; rather, it is whether the protection of women's human rights should be a top priority. Female infanticide, "honor" murders, and the systematic discrimination in food and health care allocations<sup>119</sup> do admittedly stem from cultural and social patterns; however, from a human rights perspective, they simply and undeniably result in female genocide. As we do not accept racial apartheid in South Africa as a valid cultural and social pattern, we should not accept cultural or social practices which disadvantage and exploit women.<sup>120</sup>

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116. See PHYSICIANS FOR HUMAN RIGHTS, MEDICAL TESTIMONY ON VICTIMS OF TORTURE: A PHYSICIAN'S GUIDE TO POLITICAL ASYLUM CASES (1991).

117. See Thompson, *supra* note 7 (stating that countries such as China, Singapore, and Syria which are proposing to take into account cultural and religious differences, but are denying rights to women, are effectively abolishing the concept of universal human rights).

118. CEDAW, *supra* note 72.

119. See John W. Anderson & Molly Moore, *Born Oppressed: Women in the Developing World Face Cradle-to-Grave Discrimination, Poverty*, WASH. POST, Feb. 14, 1993, at A1.

120. See Eisler, *supra* note 21, at 299.

Somehow, unlike general human rights, women's rights are more likely to be opposed on the grounds that women's rights are a threat to family, social stability, and moral order. For example, in the United States, the Equal Rights Amendment (ERA) was often opposed by men and women who feared a threat to family and social stability.<sup>121</sup> In Peru, women who report a rape are denounced as subversives.<sup>122</sup> In other nations, social and political advances by women are viewed as manifestations of an encroaching West whose imperialistic values and political agenda are threatening to undermine native cultures. Nation-states such as Iran view women's rights with extreme xenophobic suspicion.<sup>123</sup>

The cultural and moral rationales for the continued widespread practice of female genital surgery in some countries illustrate how the violation of women's rights are justified and even sanctioned. The main arguments for promoting the practice of female genital surgery include sexual control over females, religious requirements, mythical beliefs, and the need to maintain a tradition that has been with these cultures for thousands of years.<sup>124</sup> Alison Slack, expert on female genital mutilation and former Peace Corps volunteer in Mauritania, where 80% of girls and women are circumcized, successfully attacks all of these arguments. According to Slack, the entire issue boils down to a conflict between human rights and cultural sovereignty.<sup>125</sup>

Western criticism of such human rights violations may be interpreted as hypocritical. The Western world is known for its consumption of alcohol, cigarettes, dangerous sports, and cosmetic surgery. As Slack points out, it is difficult to chastise countries for performing female genital mutilation while there are "women of America who

121. See NICHOLAS, PRICE & RUBIN, RIGHTS AND WRONGS: WOMEN'S STRUGGLE FOR LEGAL EQUALITY, note 77, at 19 (1986) (explaining that much of the opposition to the Equal Rights Amendment in the U.S. stems from ignorance and misconceptions about women's current legal status and how the ERA would affect it); Donald Mathews & Jane S. DeHart, *We Don't Want To Be Men!*, in SEX, GENDER AND THE POLITICS OF THE ERA 152 (1990) (stating that some women mistakenly believe that women have already achieved legal equality).

122. See Nicholas, *supra* note 121, at 19 (recounting how General E.P. Petronio Fernandez Davila, the former Political Military Chief of the Huamanga Front, labeled the women who report rape as subversives who seek to damage the image of the armed forces); AMERICA'S WATCH, *supra* note 3, at 11-12 (adding that lawyers who defend rape victims say the continued emphasis on honor places a female victim at a legal disadvantage).

123. See Neal, *supra* note 97, at 210 (stating that in Iran, political advances by women are regarded as Western advances which are associated with the undermining of Islam); Nora Boustany, *In Iran, the Chador Has Begun to Chafe With Little Organized Help, Women Seek to Wrest Their Rights*, WASH. POST, Oct. 26, 1992, at A1.

124. Slack, *supra* note 94, at 445.

125. Slack, *supra* note 94, at 451-68.

have their ribs removed to appear thinner, their faces lifted to appear younger, and their noses made smaller and breasts made larger."<sup>126</sup>

Cultural defense arguments are understandable in light of the long tradition of customs,<sup>127</sup> global politics, and global colonization history. Nevertheless, these arguments do not justify indifference to the right of a every women to be free from violence, brutality, pain and suffering.<sup>128</sup> Under the cultural defense argument, the human rights violations of women have been dismissed as a woman's lot in life or as an ethnic tradition.

Overcoming the culture defense argument is difficult, but not impossible. One successful example is the end of the crippling footbinding of Chinese women. In China, the custom of footbinding, as with female genital surgery, was necessary to solicit suitable marriage proposals. The alternative to footbinding was social ostracism.<sup>129</sup>

Because of xenophobia, drastic change in cultures arguably has to come from within countries.<sup>130</sup> In fact, local pressure for change is coming from within many countries.<sup>131</sup> Women around the world have formed gender-identified groups to publicly protest human rights violations. Their vulnerability to abuse has, of course, increased.<sup>132</sup> Leaders and members of community and national women's human rights groups endure repeated threats, violent attacks, or simply disappear.<sup>133</sup> Therefore, in order to overcome the

126. Slack, *supra* note 94, at 463.

127. Slack, *supra* note 94, at 463 (reporting that female genital surgery has been practiced for 2500 years).

128. See Eisler, *supra* note 21, at 298 (providing examples of the brutality from which women suffer when undergoing genital mutilation, including physical and psychological health dangers that result from the use of blunt instruments and the lack of anesthesia); Slack, *supra* note 94, at 481.

129. See Slack, *supra* note 94, at 481 (comparing female circumcision to footbinding, the practice of breaking the toes and sloughing portions of flesh from the feet, as both practices were traditionally socially required); see also MARY DALY, *GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM* (1978); John K. Fairbank, *The Great Chinese Revolution: 1800 to the Present* (1986); HANNA PAPENEK, *TO EACH LESS THAN SHE NEEDS, FROM EACH MORE THAN SHE CAN DO: ALLOCATIONS, ENTITLEMENTS AND VALUE, IN PERSISTENT INEQUALITIES 170-78* (Irene Tinker ed., 1990).

130. See Edna Erez & Bankole Thompson, *Rape in Sierra Leone: Conflict Between the Sexes and Conflict of Laws*, 14 INT'L J. COMP. & APPLIED CRIM. JUST. 201, 202-09 (1990) (providing an example of an ineffective external attempt to impose change in the small West African country).

131. Eisler, *supra* note 21, at 305.

132. See AMNESTY INTERNATIONAL, *supra* note 3, at 3 (explaining about the Mothers of the Plaza de Mayo who formed in Argentina during the late 1970s to protest the disappearance of their children).

133. AMNESTY INTERNATIONAL, *supra* note 3, at 8-13 (describing women medical personnel, teachers and students, journalists, lawyers and judges, political reformers, and women's rights activists who have mobilized to protest mass detentions, torture and injustice, and who have suffered unlawful detainment, torture, and death); see also Karen Bower, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR.

culture defense argument, nations and international organizations must take responsibility and act when women proponents of change are violently suppressed. International support must be swift and without reservation. Other international efforts might include generating funds for medical assistance, helping local role models publicly contest practices, and advocating for local protective legislation.<sup>134</sup>

## B. *Proposals for Change*

### 1. *Applying the Social Group Category*

Does femaleness constitute membership in a social group for purposes of refugee/asylum law? Even though recent surveys show that throughout the world women are disproportionately represented among the illiterate, poor, unemployed, and underemployed,<sup>135</sup> the answer is "no." An innovative use of the social group category may correct the inadequacy of the traditional bases of persecution; however, a social group claim based on gender-related persecution is not designed to provide asylum eligibility to entire groups of refugees. Rather, the nature of the persecution suffered by a particular applicant is classified according to her or his affiliation to persons of like circumstances or sharing similar characteristics.

The debate centering on how to define this category continues. For example, the social group issue was addressed in *Sanchez-Trujillo v. INS*<sup>136</sup> and in *In re Acosta*,<sup>137</sup> although through different analyses.<sup>138</sup> The European Parliament and the UNHCR have urged the recognition of "women who face harsh and inhuman treatment

L. J. 173 (1993); Andrew M. Deutz, *Gender and International Human Rights*, 17 FLETCHER F. WORLD AFF. 33 (1993); Women's Rights Project, *Criminal Injustice, Violence Against Women in Brazil* 2 (1991).

134. Slack, *supra* note 94, at 83-86.

135. Not only are women disproportionately represented within these categories, they are subjected to more abuse or potential abuse because of it. See Michele Landsberg, *Human Rights Must Include Woman's Right to Escape Abuse*, TORONTO STAR, Sept. 12, 1992, at G1 (documenting that Harvard economist Amartya Sen charted 100 million women missing in "Africa and Asia, killed off by female infanticide, unequal food and medical care, forced childbearing and domestic violence").

136. *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986) (holding that young, urban, working class Salvadoran males of military age [eighteen to thirty] who had not joined the armed forces and had not expressed overt support for the Salvadoran government were not cognizable as a particular social group); see also *In re Sanchez & Escobar*, I. & N. 2996 (BIA 1985).

137. *In re Acosta*, I. & N. 2986 (BIA 1985).

138. See Maureen Graves, *From Definition to Exploration: Social Groups and Political Asylum Eligibility*, 26 SAN DIEGO L. REV. 740 (1989) (criticizing the recent judicial and administrative attempts to define social group as "unduly narrow").

because they are considered to have transgressed the social mores of their society” as a particular social group.<sup>139</sup> Likewise, refugee scholar Guy Goodwin-Gill<sup>140</sup> argued in favor of a broad meaning of social group:

a fully comprehensive definition is impracticable, if not impossible, but the essential element in any description would be the factor of shared interests, values, or background—a combination of matters of choice with other matters over which members of the group have no control. . . . Attention should therefore be given to the presence of uniting factors such as ethnic, cultural, and linguistic origin; education; family background; economic activity; shared values, outlook, and aspirations.<sup>141</sup>

Author David Parish concluded that the category of social group “must be defined by a characteristic that is imbued with social significance and that is not within group members’ power to change consistent with the dictates of conscience.”<sup>142</sup> Another scholar, David Neal, has explicitly argued that women claiming sex-based persecution should be extended asylum under the social group category.<sup>143</sup> Neal believes that this existing statutory basis is the best category to apply to the plight of refugees who have suffered gender-related persecution despite the underdevelopment of this classification in jurisprudence.<sup>144</sup>

A liberal interpretation of the social group category encompasses women with a well-founded fear of persecution with certain identifiable characteristics.<sup>145</sup> A family may be a social group if the government seeks to capture or torture a member of the family. In fact, many women face gender-related persecution because of their familial relationship.<sup>146</sup> Sofia Campos-Guardado,<sup>147</sup> whose asylum claim

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139. UNHCR, Note on Refugee Women and International Protection, U.N. Doc. EC/SCP/39 (8 July 1985).

140. GOODWIN-GILL, *supra* note 31, at 29-30.

141. *Id.* at 30.

142. T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923 (1992).

143. Neal, *supra* note 97, at 203.

144. Neal, *supra* note 97, at 204; *see also* Arthur Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 5 COLUM. HUM. RTS. L. REV. 39 (1983) (concluding that “[t]he social group category was meant to be a catch-all which could include all the bases for and types of persecution which an imaginative despot might conjure up”); Angela Botelho, Note, *Membership in a Social Group: Salvadoran Refugees and the 1980 Refugee Act*, 8 HASTINGS INT’L & COMP. L. REV. 305 (1985) (noting the elasticity of the concept and that it may be analyzed in a statistical, social, or associational context).

145. *Cf.* David Tuller, *Gay’s Request for Asylum Based on Sex Persecution: Brazilian Talks of Dangers in Going Back Home*, S.F. CHRONICLE, May 20, 1993, at A19 (noting that the same membership in a particular social group analysis could apply to gays and lesbians seeking asylum protection).

146. *See* AMNESTY INTERNATIONAL, *supra* note 3, at 13-14 (describing some of the female relatives of male activists or prisoners who the government detained, tortured or killed based

was repeatedly denied because the threats she faced were "personally motivated," could perhaps successfully seek refuge under this new category. Campos-Guardado was bound, gagged, and forced to witness guerilla fighters cut the flesh from her male relatives whom the guerillas considered a political enemies.<sup>148</sup> She was then raped while political slogans were shouted. This case was not considered on the grounds of membership in a social group; instead, the immigration judge, the Board of Immigration Appeals and the Fifth Circuit each held that although Campos-Guardado was telling the truth, her claim of persecution was not the result of her political opinion or an imputed political opinion:

[W]hile the attackers may have been motivated by their own political goals such as, for example, the intimidation of other peasants involved in land reform, the record does not reestablish that [Campos-Guardado] was persecuted on account of any political opinion she herself possessed or was believed by the attackers to possess.<sup>149</sup>

Because rape and other forms of violence are used against women who are politically involved, rape can also constitute persecution on account of political opinion. Some rapes may be understood as persecution against women who are related to a politically targeted family member. The rape of Campos-Guardado was a result of her witnessing the murder of her uncle and cousin. Rape was the method of choice to terrorize and intimidate her from trying to legally avenge her uncle and cousin's murderers. When she was continuously harassed and threatened because of the rape, and she knew there existed no system for prosecuting her attackers in El Salvador, she fled.<sup>150</sup> Her claim should have been successful under the social group category.

## 2. *Applying the Political Opinion Category*

In some gender-related persecution cases, it should be possible to seek political asylum. A political asylum claim is one of well-founded fear of persecution on account of political opinion. At least one court has acknowledged that rape can constitute persecution on account of political opinion.<sup>151</sup> In *Lazo-Majano*, the Ninth Circuit overturned

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on their association).

147. *Campos-Guardado v. INS*, 809 F.2d 285, 287-88 (5th Cir. 1987).

148. *Id.*

149. *Id.* at 288.

150. *Id.*

151. *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987).



lower decisions denying the applicant's claim of well-founded fear of persecution on account of political opinion.<sup>152</sup> Scholars Maureen Mulligan<sup>153</sup> and Jacqueline R. Castel<sup>154</sup> analyzed this case and *Campos-Guardado* to consider whether rape could qualify as persecution on the basis of political opinion.

Mulligan asserts that there is adequate statutory and case law for rape in particular circumstances to be considered persecution on account of political opinion.<sup>155</sup> She observes that in the context of life in El Salvador, Olympia Lazo-Majano and Sofia Campos-Guardado, both rape victims, made a decision not to speak out against their persecutors—a decision that constituted a political choice.<sup>156</sup> Mulligan argues that the consciousness of immigration judges needs to be raised to recognize rape as a form of political control:<sup>157</sup>

Thus, if there is no effective prosecutorial system available to a woman in the country where the rape has occurred, or if her life is endangered by bringing the issue to the attention of the authorities, then the applicant has a well founded fear of persecution on account of political opinion.<sup>158</sup>

Similarly, Castel states that "rape should constitute persecution within the refugee definition when it is inflicted by the State as a form of torture, when there is no system of redress against the attacker, and when the woman would put her life in danger by alerting the authorities."<sup>159</sup>

Despite these recent commentaries, asylum claims of persecution on account of political opinion will probably continue to require that the women making the claim be active in politics. Recognizing that there are many obstacles to framing a successful claim for refugee status for sexually assaulted women, Castel ends her article with a call for the Canadian Government to include gender in the definition of refugee in its Immigration Act.<sup>160</sup>

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152. *Id.* at 154.

153. See Maureen Mulligan, *Obtaining Political Asylum: Classifying Rape as a Well-Founded Fear of Persecution on Account of Political Opinion*, 10 B.C. THIRD WORLD L.J. 354 (1990).

154. See Jacqueline R. Castel, *Rape, Sexual Assault and the Meaning of Persecution*, 4 INT'L J. REFUGEE L. 39 (1992).

155. Mulligan, *supra* note 153, at 358.

156. Mulligan, *supra* note 153, at 373.

157. Mulligan, *supra* note 153, at 379.

158. Mulligan, *supra* note 153, at 379-80.

159. Castel, *supra* note 154, at 54.

160. Castel, *supra* note 154, at 56.

### 3. *Aleinikoff's Rethinking Persecution*

Professor T. Alexander Aleinikoff agrees that the narrow application of the five categories of race, religion, nationality, membership in a social group, or political opinion is contrary to the true intent of the 1951 Convention and presumably, the United States Congress' intent to adopt the Conventions definition.<sup>161</sup> He also cites the *Campos-Guardado* case as an example of a narrow and overly technical interpretation of the law.<sup>162</sup> He argues that the "on account of" element has taken on a great significance in current adjudicatory practice, often overlooking the "persecution" factor of the analysis entirely.<sup>163</sup> Aleinikoff does not propose a new category or a revisitation of political opinion or social group. He offers instead a "rethinking" of the meaning of persecution which returns to the principal focus of the Convention and ensures that protection remains the "central concern of U.S. refugee law."<sup>164</sup>

### 4. *A New Category for Gender-Related Persecution*

The inadequacy of the traditional, enumerated grounds has led to proposals for a sixth enumerated category based on gender.<sup>165</sup> This sixth category will hopefully redress the failure of the current asylum law to protect against persecution suffered particularly by women.

In Canada, women's groups and human-rights organizations have been publicizing gender-related persecution cases and actively working to recognize persecution on account of sex/gender.<sup>166</sup> This publici-

161. T. Alexander Aleinikoff, *The Meaning of Persecution in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5 (1991).

162. *Id.* at 8. Some of the other cases he explores are: *In re Fuentes, I. & N. 3065* (BIA 1988) (involving a former El Salvadoran policeman who claimed persecution by leftist insurgents in El Salvador on account of his association with the government of El Salvador); *Dwomoh v. Sava*, unpublished dec. A26 905 882 (BIA, Aug. 1, 1988), 696 F. Supp. 970, 972 (S.D.N.Y. 1988) (reversing the decision of the BIA because the "BIA's interpretation of the definition of refugee contravenes the intent of Congress as reflected in the Act itself and the Act's legislative history"); *Canas-Segovia, I. & N. 3074* (BIA 1988) (granting asylum to a Jehovah's Witness based on the claim that the El Salvadoran draft law has no conscientious objector exemption); *In re Chang, I. & N. 3107* (BIA 1989) (holding that China's one child policy is not persecutive on its face even to the extent that involuntary sterilizations may occur); *Hernandez-Ortiz, 777 F.2d 509* (9th Cir. 1985) (reversing the Board's refusal to reopen El Salvadoran asylum applicants Hernandez-Ortiz's case because the Board had abused its discretion).

163. Aleinikoff, *supra* note 161, at 23.

164. Aleinikoff, *supra* note 161, at 23.

165. See Thompson, *supra* note 117 and accompanying text; Clyde H. Farnsworth, *Asylum in Canada: In a Landmark Change, Refugee Status May Be Given to Persecuted Women*, N.Y. TIMES, Feb. 7, 1993, at 2.

166. *But cf.* Jacqueline Greatbatch, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 14 INT'L J. REFUGEE L. 518, 524, 526 (1989) (criticizing this innovative approach for making assumptions about the nature of gender-based persecution and for failing to take steps to help

ty has succeeded in making female asylum-seekers a national issue in Canada, forcing the government to reconsider its position on gender-based refugee claims.<sup>167</sup> As a result, new guidelines were drafted, noting that refugee case law "is based on, for the most part, the experiences of male claimants," overlooking "female-specific experiences, such as infanticide, circumcision, bride-burning, forced marriage, forced abortion or compulsory sterilization."<sup>168</sup> The guidelines were issued in March 1993 by Canada's Immigration and Refugee Board after much debate.<sup>169</sup> They do not have the force of law, but they do urge refugee judges to take these female realities into account.<sup>170</sup>

Under a gender-based category, however, it is possible that U.S. refugee/asylum cases involving domestic violence and other abuses against women would turn out differently. For example, in *In re Pierre*,<sup>171</sup> a victim of domestic violence testified that her husband, a deputy in the Haitian Government, had threatened her life and attempted to kill her. As a deputy in the Haitian Government, her husband could beat and even kill his wife without any fear of punishment or reprisal.<sup>172</sup> Therefore, while in the United States as a temporary visitor, she remained beyond the period authorized and applied for withholding of deportation pursuant to section 243(h) of the Act.<sup>173</sup> She feared the Haitian government would neither intervene nor prevent the persecution that she faced due to her

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develop gender-based refugee claims within the existing framework, rather than creating a separate "female paradigm" for gender-based claims to persecution); Peggy Curran, *Is Sexual Equality a Universal Value?: Debate Rages Over Giving Refugee Status to Abused Women*, GAZETTE (Montreal), Feb. 15, 1993, at C1.

167. See Walsh, *supra* note 11.

168. See Walsh, *supra* note 11.

169. See Walsh, *supra* note 11; Charles Trueheart, *Canada Opens Doors to Refugee Claims Based on Gender Increasing Number of Women Seeking Asylum*, WASH. POST, Feb. 27, 1993, at A17; Charles Trueheart, *They Are Refugees Because of Their Sex, The Women Cite a Range of Reasons For Seeking Asylum, From Harassment for Their Politics, to Officially Sanctioned Rape and Domestic Violence*, PHIL. INQ., Mar. 14, 1993, at C20; Deborah Sontage, *Refugees From Rape, Haitian Women Are Seeking Asylum on Grounds They Have Suffered Sexual Persecution*, SAN FRAN. CHRON., Oct. 17, 1993, at Z5.

170. GUIDELINES, *supra* note 98, at 1 (identifying four potentially relevant issues: 1) To what extent women making this claim may rely on one of the five grounds of the Convention refugee definition; 2) under what circumstances sexual violence or other prejudicial treatment towards women constitutes "persecution"; 3) what are the key evidentiary elements decision-makers must look to when considering this claim; and 4) what special problems do women face when called upon to state their claim at refugee determination hearings).

171. *In re Pierre*, I. & N. 2433 (BIA 1975).

172. *Id.*

173. See INA § 243(h), *supra* note 44 and accompanying text (summarizing the different standards required to show a well-founded fear of persecution depending on whether it is asylum—an easier standard but only discretionary relief—and withholding of deportation relief which requires a higher standard than asylum but provides mandatory relief).

gender; her socialized status as a woman and wife of a deputy of the Haitian government.<sup>174</sup>

The Board of Immigration Appeals denied her application, stating that she had not established that she would be persecuted on account of one of the five enumerated categories.<sup>175</sup> The court concluded that "the motivation behind her husband's alleged actions appears to be strictly personal."<sup>176</sup> The Board stated that Pierre needed to establish that 1) the government of Haiti was unable or unwilling to restrain her husband, *and* 2) that her husband sought to persecute her on account of her race, religion, or political beliefs.<sup>177</sup> The Board failed to take into account the gendered nature of wife abuse. It concluded that the abuse was personal or random; whereas persecution is generally seen as a deliberate, governmental policy against identifiable groups of people. In fact, as Stairs and Pope point out, spousal abuse is not random, but "highly gendered in virtually every country."<sup>178</sup>

### C. Overcoming Anti-Foreigner Sentiment

Proposals for refugee/asylum reform suffer from a lack of viability in this country. The political atmosphere prevents new proposals from being seriously considered. In the United States, "[t]he problem of asylum and refugee status is overshadowed by [the] intense political struggle over immigration policy, particularly the growing perception that illegal immigration of Hispanics and other minority groups will erode the political and economic stability of the nation."<sup>179</sup> Also, as recently seen with the Haitian crisis,<sup>180</sup> the desire to help the world's poor and oppressed clashes with the belief of most Americans that substantial immigration is undesirable and threatening

174. In re Pierre, I. & N. 433, 461 (BIA 1975) (noting the position of deputy in the Haitian Government is analogous to that of a Senator in the United States Government).

175. In re Pierre, I. & N. 2433 (BIA 1975).

176. In re Pierre, I. & N. 433, 463 (BIA 1975).

177. In re Pierre, I. & N. 433, 463 (BIA 1975).

178. Stairs & Pope, *supra* note 100, at 185.

179. Kenneth D. Brill, Note, *The Endless Debate: Refugee Law and Policy and the 1980 Refugee Act*, 32 CLEV. ST. L. REV. 117, 174 (1983-1984) (describing the policy, history, and evolution of refugee law).

180. See *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (involving a group of Haitian refugees who filed a class action suit because not one asylum grant had been made in their district); accord *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988) (finding in favor of class of Salvadoran citizens who had filed suit against INS); see also Robert Shepard, *House Votes to Ban HIV Infected Immigrants*, UPI, Mar. 11, 1993, available in LEXIS, News Library, Curnews File, Religious News Service, *Churches Take Lead in Resettling Released HIV-Infected Haitian Refugees: After Judges Ruling Two Religious Groups Move Swiftly to Implement Resettlement of Refugees Detained at Guantanamo Navy Base in Cuba since 1992*, L.A. TIMES, June 19, 1993, at B5.

to their economic interests.<sup>181</sup> The danger of anti-foreigner sentiment is illustrated by Germany's recent move to restrict its former open-door asylum policy. Their policy had been written into their constitution forty-four years ago to atone for persecution of foreigners by the Nazis.<sup>182</sup> Like a domino effect, neighboring countries, fearful the refugees Germany rejects will flood their country, are also preparing to restrict immigration with new visa laws.<sup>183</sup>

Asylees in the United States have recently been unfairly attacked in two major news media events: the World Trade Center bombing<sup>184</sup> and the CIA shooting.<sup>185</sup> Both tragic events were allegedly instigated by aliens living in the United States and applying for asylum. The media has also focused on the undue delays in processing asylum claims. For example, the weekly television program, *60 Minutes*, broadcasted a prejudicial image of undocumented aliens carrying their bags out of JFK airport because of the lack of INS detention space.<sup>186</sup> To some extent, however, both governmental and human rights groups welcome this coverage because it illuminates the unfair treatment of many asylum applicants and the INS' backlogged systems.<sup>187</sup>

181. See Don Villarejo, *Migrant-Bashing Down on the Farm; Immigration: It's a Myth that Crop Workers are a Drain on Social Services. They Don't Even Receive Protection of the Law*, L.A. TIMES, Dec. 1, 1993, at B7.

182. See, e.g., Associated Press, *Germany Rejects Asylum Seekers as Restrictive Law Takes Effect*, WASH. POST., July 2, 1993, at A26; *Germany Begins Rewriting Open-Door Asylum Policy*, ORLANDO SENTINIAL TRIB., Mar. 5, 1993, at A8 [hereinafter *Restrictive Law Takes Effect*]; Marcus Kabel, *German Police Cordon off Parliament for Asylum Debate*, REUTER LIBRARY RPT., May 25, 1993.

183. *Restrictive Law Takes Effect*, *supra* note 182.

184. See Melita Marie Garza, *Immigrant Rights Center Faces Tough U.S. Hurdles*, CHI. TRIB., July 30, 1993, at S.W.1 (explaining that President Clinton's crackdown on asylum claims after the World Trade Center bombing may have a negative impact, raising the public's apprehension about immigration and asylum procedures that allegedly permitted Egyptian cleric, Shekh Omar Abdel-Rahman, to travel in and out of the country).

185. See Robert L. Jackson, *Suspect in CIA Slayings Still Eludes Arrest; It's Still a Mystery Why the Gunman Shot Five People Outside the Agency's Headquarters in Virginia*, L.A. TIMES, Oct. 13, 1993, at A5 (reporting that a gunman shot five people in broad daylight outside CIA headquarters in Langley, Virginia and that eight months later the gunman had still not been arrested. Officials suspect a 29 year old Pakistani national named Mir Aimal Kansi who entered the United States on a temporary visa in 1990 and later sought political asylum, which was not granted).

186. *60 Minutes: How Did He Get Here?* (CBS television broadcast, Mar. 14, 1993) (describing rampant abuse of U.S. political asylum and immigration laws at U.S. airports).

187. See *Reforming the Affirmative Asylum Processors*, REFUGEE RPTS., 14 U.S. Committee for Refugees 6 (May 3, 1993) (noting that part of the problem lies with understaffing in the asylum system). Although Germany had the highest number of claims, 438, 191, they also had 3,500 staff members, for an average of approximately 125 claims each. Sweden's average was 105 claims per staff member. Norway had the best ratio with each staff member responsible for about 13 claims in 1992. In the United States, however, with 103,447 claims in 1992 and only 297 staff members, each would have to process 348 claims a year to fully address the situation. *Id.*

Unfortunately, with the new impetus for asylum reform comes an increased fear and rejection of so called "foreign elements" and the perception that foreigners are dangerous to U.S. society.<sup>188</sup> The perception that all asylees are terrorists who use the backlogged asylum system to enter the United States and kill innocent people is unfounded. This view exaggerates an otherwise legitimate concern for the safety of United States citizens and national security. To respond to this concern by abandoning the legal and moral guidelines with regard to asylees ultimately yields dangerous, destructive, and self-defeating results. The United States is a world leader and sets the tone for humanitarian concerns. The United States cannot expect the rest of the world to comply with human rights principles if it turns its back when these principles become inconvenient.

### CONCLUSION

Not all cases of gender-related subjugation constitute persecution, just as not all cases involving discrimination on account of race, nationality, religion, social group, or political opinion constitute persecution. How to determine when and under what circumstances sexual violence or other prejudicial treatment towards women constitute persecution remains a key issue. The four proposals address the disparate treatment of women asylum applicants. Although stated separately above, these four proposals are not mutually exclusive. As some of the scholars themselves have noted, it is perhaps a combination of some or all of these proposals that would best address the problem.

The theoretical analysis that these proposals present must be combined with realistic and practical efforts<sup>189</sup> to change the general attitude and political climate with regard to culture defense arguments and to anti-foreigner sentiment. Proposals for change must address the political pressures that discourage any expansion of

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188. See, e.g., Maria Puente, *USA Cool to Huddled Masses, Sentiment Sours as Rate of Arrival Rises*, USA TODAY, July 14, 1993, at A1 (describing the immigration backlash against Chinese refugees trying to sneak into U.S. ports, Haitians with the AIDS virus, and immigrants arrested in connection with New York bomb plots); Anthony Lewis, *Anti Immigration Fervor Ignoring Facts*, HOUSTON CHRON., Jan. 15, 1994, at A32 (observing that despite the feeling against immigrants in California, most experts believe immigrants benefit, not burden the economy and that the real reason for anti-foreigner sentiment is xenophobia); Frank Trejo, *Rethinking Immigration; Near-Record Influx, Publicized Incidents Help Prompt Calls for Reform*, DALLAS MORNING NEWS, Jan. 2, 1994, at A1 (speculating that negative focus on immigration will lead to reforms that curtail immigration); Don Villarejo, *supra* note 181.

189. Stairs & Pope, *supra* note 100, at 148, 222-25 (noting that there have been strides to establish outreach and public education with community groups and shelters on behalf of assaulted migrant women at Parkdale Community Legal Services in Canada).

immigration policy. This political climate makes it even more difficult to attract attention to the plight of women refugees applying for asylum because of gender-related persecution.

To wait for the right time or for governments or politicians to address gender issues is to wait indefinitely. Gender issues should not be secondary or dealt with after any “bigger” problem is solved. Lawmakers must understand that the asylum process is overwhelmingly gender-related in order to address it adequately and effectively. Certainly U.S. refugee/asylum law suffers from problems other than gender bias; however, this fact should not excuse relegating gender issues to secondary status. Gender bias is not a “women’s problem”, it is a problem affecting everyone, including husbands, brothers, and sons; and “[i]f governments ignore their responsibilities to any sector of society—whether to women, to men, to the young, or to members of ethnic or religious minorities—then no one’s human rights are safe.”<sup>190</sup>

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190. AMNESTY INTERNATIONAL, *supra* note 3, at 4.

